83-942

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No.

IN THE

Supreme Court of the United States

October Term, 1983

RIPLEY COUNTY AREA PLAN COMMISSION,

Petitioner

vs.

MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED FOR REVIEW

Whether amortization, as a means to phase out pre-existing lawful uses rendered non-conforming by a zoning ordinance, is *per se* a taking of property without due process of law under the Fourteenth Amendment to the United States Constitution.

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MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The petitioner Ripley County Area Plan Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on May 12, 1983.

QUESTION PRESENTED FOR REVIEW

Whether amortization, as a means to phase out pre-existing lawful uses rendered nonconforming by a zoning ordinance, is *per se* a taking of property without due process of law under the Fourteenth Amendment to the United States Constitution.

PARTIES

All parties are identified in the caption.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana in the consolidated appeal of *Ailes v. Decatur County Area Planning Commission et al.* is printed at Appendix A hereto, p. A-1, *infra*, and is reported at 448 N.E.2d 1057 (1983). The opinion of the Court of Appeals of Indiana in *Ailes v. Decatur County Area Planning Commission et al.* is printed at Appendix C hereto, p. C-1, *infra*, and is reported at 437 N.E.2d 1375 (1982). The judgment of the Ripley Circuit Court in *Ripley County Area Plan Commission v. Melvin T. Rouse* was not reported but is printed at Appendix D hereto, p. D-1, *infra*. The order of the Ripley Circuit Court on the Motion For Relief From Judgment in *Ripley County Area Plan Commission v. Melvin T. Rouse* was not reported but is printed at Appendix E hereto, p. E-1, *infra*. The order on the Motion to Correct Errors in *Ripley County Area Plan Commission v. Melvin T. Rouse* was not reported but is printed at Appendix F hereto, p. F-1, *infra*.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on May 12, 1983. A timely petition for rehearing was denied on August 4, 1983. On October 21, 1983,

petitioner applied for an extension of time to file this petition and on October 24, 1983, Mr. Justice Stevens extended the time to file this petition until December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ripley County Zoning Ordinance of 1970, Section 3.5(g):

> "The lawful use of a building or premises existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided."
>
> * * * *
>
> "(g) Any nonconforming open use of land shall be discontinued within five (5) years from the date of passage of this ordinance."

STATEMENT OF THE CASE

The pertinent facts and circumstances surrounding this cause are undisputed. Melvin T. Rouse, one of the respondents herein, owned certain real estate in Ripley County, Indiana which he had utilized as a junkyard since 1953. On June 15, 1970, the county commissioners adopted a zoning ordinance which zoned the district wherein Rouse's property was located for medium density single and two-family residences. Junkyards were prohibited therein. The ordinance contained the familiar language that prior nonconforming uses could continue in existence but specified that any nonconforming open land use must be discontinued within five years from the date of its passage. (R. 2).

On August 23, 1977, the Ripley County Area Plan Commission filed a complaint for injunctive relief against Rouse seeking to enjoin any further use of his property as a junkyard. On August 8, 1978, the Ripley Circuit Court granted the relief requested and ordered Rouse to remove all junked automobiles and junk equipment within ninety days. (R. 3). On September 13, 1980, Rouse filed a motion for relief from judgment pursuant to Ind. Rules of Trial Procedure, Rule 60(B) alleging that the foregoing five year amortization provision was an unconstitutional taking of property without due process of law. (R. 11). The trial court overruled the motion and Rouse sought appellate review raising only the constitutional issue for consideration.[1] (R. 4, 5).

The judgment of the Ripley Circuit Court was affirmed by the Indiana Court of Appeals which ruled that the

[1] It should be noted that the Rouse appeal was consolidated with an appeal brought by Ralph and Elizabeth Ailes who had unsuccessfully challenged a Decatur County amortization ordinance as an unlawful taking of property without due process of law. (App. A-1).

amortization provision at issue was not unconstitutional *per se* as the taking of property without due process of law.[2] (App. C-1) The Supreme Court of Indiana vacated the Court of Appeals decision and held that amortization, in and of itself, is *per se* an unconstitutional taking of property without due process of law.[3] (App. A-1).

> "We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power." (App. A-8).

It is from this decision that the petitioner, Ripley County Area Plan Commission, seeks to obtain certiorari review.

REASONS FOR GRANTING THE WRIT

A.

Whether the elimination of nonconforming uses through a gradual amortization of the value of the use constitutes an unlawful taking of property without due process of law under the Fourteenth Amendment is an issue which has never been settled by this Court but it should be. Foremost among the reasons for granting certiorari in this case is that amortization has generally been regarded as the only effective means in zoning for abating nonconforming uses. As a consequence of the Indiana Supreme Court's decision that all amortization provisions are necessarily invalid

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[2] A similar result was reached with respect to the Ailes appeal. (App. A-1).

[3] The Supreme Court of Indiana also reversed the judgment in the Ailes appeal. (App. A-1). However, the appellee therein, the Decatur County Area Planning Commission, has elected not to seek certiorari review in this case.

under the federal Due Process clause,[4] Indiana municipalities have been deprived of a valuable tool for ensuring compliance with comprehensive zoning plans and their ability to displace particularly troublesome nonconforming uses such as junkyards and billboards has been severely hampered.

The significance of the case at bar is further underlined by the fact that it is the only reported decision in this country to strike down amortization *solely* on federal due process grounds. A perusal of those cases which have embraced the minority view that amortization is unconstitutional *per se* reveals that, in each of them, the decision rested on an adequate and independent state grounds thereby evading certiorari review. The instant case is therefore one of first impression in this Court and should be resolved so that local communities may implement reasonable amortization provisions as a way of ridding themselves of nonconforming uses without fear that they are skating on constitutional ice no thicker than a summons.

B.

That the Indiana Supreme Court's decision in this matter will have serious ramifications on the ability of cities and

[4] While the Indiana Supreme Court did not specify whether its decision was premised on the United States Constitution or the Indiana Constitution, a comparison of relevant provisions from each document makes it abundantly clear that only the federal constitution was at issue. The state constitutional provision corresponding to the federal due process clause is Article I, §12 which provides in pertinent part: "[E] very man, for injury done to him in his person, property, or reputation shall have remedy by due *course* of law". (emphasis added).

Certainly the Indiana Supreme Court, being the final arbiter of the state constitution, would not have overlooked the difference in language if it had intended to decide the case on non-federal grounds. It is significant to note that nowhere in the record or in the briefs did respondents Rouse or Ailes cite Article I, §12.

towns to promote orderly community development cannot be doubted when the dilemma posed by nonconforming uses is considered. Early zoning thought discounted the impact of nonconforming uses on the attainment of zoning objectives since it was anticipated that such uses would dwindle and disappear of their own accord. Note, *Zoning And The Amortization of Nonconforming Uses*, 54 N.D.L.R. 231 (1977).

> "[I]t was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property users at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun."

Grant v. Mayor and City Council of Baltimore, (1957) 212 Md. 301, 129 A.2d 363 at 365.

However, contrary to the initial assumptions of zoning advocates, it has become increasingly evident that pre-existing nonconforming uses have no inherent tendency to fade away. Comment, *The Abatement of Pre-existing Nonconforming Uses under Zoning Laws: Amortization*, 57 N.W.U.L.R. 323 (1962). Despite numerous restrictions on change, expansion, resumption and reconstruction, many of these uses have not only continued to exist but have prospered as never before under the artificial monopolies bestowed on them by zoning laws. Rohan, *Zoning and Land Use Controls* §41.04 (1983).

Their continued presence, though, has often exacted a heavy toll on the community at large. In several instances,

nonconforming uses have reduced the effectiveness of zoning, depressed property values and contributed to the growth of urban blight. Comment, *Conforming The Nonconforming Use: Proposed Legislative Relief For A Zoning Dilemma*, 33 S.W.L.J. 855 (1979). An early survey of nonconforming uses in Indiana communities reinforces these conclusions:

> "Over 50 per cent of the nonconforming neighborhood businesses were closely abutted by substandard dwellings. In excess of 30 per cent of the commercial structures were in a state of disrepair or were adjoined by utility or storage "shacks." Inadequate parking and loading facilities leading to traffic congestion, and unwarranted accumulations of junk and trash were also identifying markers of this use. Fifty-nine per cent of the multi-family dwellings had traffic problems which could be traced to inadequate parking space.... Ninety-one per cent of the industries caused traffic congestion, and fifty-five per cent of them contained unnecessary large quantities of waste and junk.... The tendency of adjoining owners to permit their property to fall into disrepair can be traced to these factors."

See, Amortization and Performance Standards in Zoning Regulations: Study of Existing Nonconforming Uses in an Indiana Community, 30 Ind. U.L.R. 521, 524 (1955).

The failure of nonconforming uses to dissipate by natural attrition led to the adoption of amortization as a means for hastening their departure. Essentially, amortization contemplates the compulsory termination of a nonconforming use at the expiration of a specified period of time, which period roughly corresponds to the useful economic life of the nonconformity. *See* Wood, *Zoning Ordinances Requiring The Termination Of A Nonconforming Use*, 1973 Institute on Planning, Zoning and Eminent Domain 23. The theory behind amortization is based on the principle

that a property owner should be given time to recoup his investment in property before he is forced to discontinue the use without compensation. Rohan, *Zoning and Land Use Controls* §41.04 (1983).

The technique of terminating nonconforming uses through amortization has won a fair measure of judicial approval in the United States. See 22 *A.L.R.*3d 1134 and cases cited therein. The leading decision in this area, *City of Los Angeles v. Gage*, (1954) 127 Cal.App.2d 442, 274 P.2d 34, accurately reflects the position taken by the majority of courts which have confronted the issue.

> "The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating the existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. Nonconforming uses will eventually be eliminated. A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses."

274 P.2d at 44.

Undoubtedly influenced by the approving nod given to this approach, a substantial number of municipalities have adopted ordinances requiring amortization. According to a

nationwide study conducted in 1971 by the American Society of Planning Officials[5] (hereinafter referred to as the "ASPO report"), appoximately 33% of the 459 communities responding had enacted amortization provisions. Similarly, a recent survey of plan commissions across Indiana (hereinafter referred to as the "Indiana survey") indicates that over 31% of the respondents have amortization regulations in place.[6] Interestingly enough, of those plan commissions without amortization, 51% stated that they would consider its implementation---if the power to amortize were upheld as constitutional.

These figures demonstrate that there is a significant groundswell of support for amortization and underscore the impact of the instant decision on zoning enforcement. The ruling of the Supreme Court of Indiana that all amortization ordinances are *per se* unconstitutional under the Due Process clause of the Fourteenth Amendment necessarily invalidates a common zoning technique for eliminating nonconforming uses. Without it, municipalities are relegated to traditional zoning restrictions on change of use, resumption, increase of size and reconstruction which have largely proven to be unsuccessful.

Put another way, the denial of certiorari in this case would sweep away what has been widely accepted as the only viable means for terminating nonconforming uses. *City of Los Angeles v. Gage*, (1954) 127 Cal.App.2d 442, 274

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[5] Scott, *The Effect of Nonconforming Land-Use Amortization*, American Society of Planning Officials Report No. 280 (1972).

[6] In connection with the preparation of this petition, the Metropolitan Development Commission of Marion County, Indiana mailed questionnaires to over 200 plan commissions in the state, of which there was a 50% rate of return. The purpose of this survey was to determine the extent to which amortization ordinances have been adopted in Indiana as well as to elicit opinions and information based on practical experience on the effectiveness of amortization in dealing with nonconforming uses.

P.2d 34; *Board of Supervisors of Cerro Gordo County v. Miller*, (1969) Ia., 170 N.W.2d 358; *Grant v. Mayor and City Council of Baltimore*, (1957) 212 Md. 301, 129 A.2d 363; *Spurgeon v. Board of Commissioners of Shawnee County*, (1957) 181 Kan. 1008, 317 P.2d 798. According to the results of the Indiana survey, 42% of the plan commissions queried responded that amortization was a very effective means for eliminating nonconforming uses while 29% opined that it was somewhat effective. Turning to the ASPO report, the percentages were evenly distributed between those reporting excellent or good enforcement experience (34%) and those indicating poor experience (33%).[7]

Amortization has been most effective with respect to billboards and open land uses. 4 Rathkopf, *The Law of Zoning and Planning* §51.09(4) (1983). The ASPO report[8] reflects that 54% of the responding communities reported amortizing signs; 25% reported amortizing land and 17% reported amortizing junkyards. While these uses have greater visual and audible impacts upon neighboring uses than do other nonconformities, they are the ones least vulnerable to restrictions upon resumption after discontinuance, restoration after destruction by fire, flood or other fortuitous means and are seldom abandoned. Rathfopf, *supra* §51.09(1). Unless amortization is upheld as a proper exercise of the police power under the Fourteenth Amendment, these objectionable uses will never be eliminated.

C.

Also compelling the issuance of a writ of certiorari in this case is the fact that this Court has not heretofore addressed the substantial federal question raised by the decision of the Supreme Court of Indiana which, it should be added, is

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[7] *Scott, supra*, p. 8.

[8] *Ibid*, p. 8.

in direct conflict with the overwhelming weight of authority on the matter. Of the few states which have followed the minority view that amortization is *per se* invalid, all of them have rested on an adequate and independent state grounds and thus have evaded certiorari review. Compare, *Hoffman v. Kinealy*, (1965) Mo., 389 S.W.2d 745 (amortization constitutes taking of private property for public use without just compensation in violation of state constitutional provision); *City of Akron v. Chapman*, (1953) 160 Ohio St. 382, 116 N.E.2d 697 (amortization impinges upon the due process clauses of both the state and federal constitutions); *United Advertising Corp. v. Borough of Raritan*, (1952) 11 N.J. 144, 93 A.2d 362 (amortization is contrary to zoning statute expressly permitting the continuance of nonconforming uses); *DeMull v. City of Lowell*, (1962) 368 Mich. 242, 118 N.W.2d 232 (state statute prohibits termination of nonconforming uses by amortization).

By contrast, Indiana is the first and only state to have invalidated amortization on federal due process grounds alone. This posture places it squarely in conflict with the prevailing view which sanctions the technique of amortization as a valid exercise of the police power under the Due Process clause of the Fourteenth Amendment, provided that on balance the public benefit outweighs the private injury and the time allowed for termination is reasonable.

See, *Art Neon Co. v. City and County of Denver*, (10th Cir. 1973) 488 F.2d 118; *City of Los Angeles v. Gage*, (1954) 127 Cal.App.2d 442, 274 P.2d 34; *Board of Supervisors of Cerro Gordo County v. Miller*, (1969) Ia., 170 N.W.2d 358; *Spurgeon v. Board of Commissioners of Shawnee County*, (1957) 181 Kan. 1008, 317 P.2d 798; *State ex rel. Dema Realty Co. v. Jacoby*, (1929) 168 La. 752, 123 So. 314; *Inhabitants of the Town of Boothbay v. National Advertising*

Company, (1975) Me., 347 A.2d 419; *Wolf v. City of Omaha*, (1964) 177 Neb. 545, 129 N.W.2d 501; *Harbison v. City of Buffalo*, (1958) 4 N.Y.2d 553, 152 N.E.2d 42; *State v. Joyner*, (1975) 286 N.C. 366, 211 S.E.2d 320; *Rives v. City of Clarksville*, (1981) Tenn.App., 618 S.W.2d 502; and *Swain v. Board of Adjustment of City of University Park*, (1968) Tex.Civ.App., 433 S.W.2d 727.[9]

If the parameters of the police power under the Fourteenth Amendment are broad enough to sustain reasonable amortization provisions in California, Texas, Kansas, New York and numerous other localities, then *a fortiori* they are inclusive enough to uphold such ordinances in Indiana as well. Surely the reach of the federal Due Process clause does not stop at the Indiana border. The authority of municipalities to employ amortization as a means for phasing out nonconforming uses and the attendant rights of the owners of nonconformities to due process of law should not be dependent upon the state or circuit in which the question arises. Such a result would be inimical to the notion of due process.

D.

The Petitioner herein, Ripley County Area Plan Commission, has cited several reasons in support of its assertion that this case is "cert-worthy". Among them is the

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[9] Various other courts have upheld amortization ordinances, if reasonable, without isolating the specific federal or state constitutional provision involved, upon incantation of the phrase "due process of law". *Standard Oil Co. v. City of Tallahassee*, (5th Cir. 1950) 183 F.2d 410; *Naegele Outdoor Advertising Company of Minnesota v. Village of Minnetonka*, (1968) 281 Minn. 492, 162 N.W.2d 206; *LaChapelle v. Town of Goffstown*, (1967) 107 N.H. 485, 225 A.2d 624; *Beals v. County of Douglas*, (1977) Nev., 560 P.2d 1373; *State v. Sanguinetti*, (1982) Vt., 449 A.2d 922; *City of Seattle v. Martin*, (1959) 54 Wash.2d 541, 342 P.2d 602.

fact that amortization is crucial to the efforts of municipalities seeking to terminate nonconforming uses.

> "The issue of the amortization of nonconforming uses is of significant consequence to local planning and zoning efforts in this state. An absolute prohibition against amortization will defeat the purpose of zoning efforts, for the gradual elimination of a use not compatible with the public welfare could not be accomplished."[10]

Equally important in persuading the court to grant certiorari review is the fact that this case calls into question the validity, under the United States Constitution, of a zoning technique common to many communities nationwide. A definitive opinion on this subject would lay to rest any lingering doubts regarding the constitutionality of this zoning device and resolve the split of authority which has arisen by virtue of the Indiana Supreme Court's decision in this case.

[10] Hunter, J: dissent, App. A-14.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF INDIANA

RALPH D. AILES and ELIZABETH J. AILES,	)	
Appellants,	)	
v.	)	
DECATUR COUNTY AREA PLANNING COMMISSION and Decatur County Board of Zoning Appeals,	)	Supreme Court No. 583 S 171 Consolidated Cause No. 1-381 A 98 in the Court of Appeals
Appellees,	)	
and	)	
MELVIN T. ROUSE,	)	
Appellant,	)	
v.	)	
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Appellee.	)	

APPEALS FROM THE DECATUR CIRCUIT COURT
and the RIPLEY CIRCUIT COURT
The Honorable John A. Westhafer, Judge
The Honorable Henry A. Pictor, Judge
Cause No. C-79-137
Cause No. C-77-128

PIVARNIK, J.

This cause comes to us on a petition to transfer from the Fourth District Court of Appeals. Transfer is sought by Appellants in the Court of Appeals, who were Defendants in the trial court. Appeal was consolidated challenging the constitutionality of amortization provisions in the zoning ordinances of two different counties, both of which require the discontinuance of pre-existing lawful non-conforming uses of real estate upon the expiration of a specific number of years. After injunctions were issued against Appellants Ralph and Elizabeth Ailes and Rouse, enjoining them from operating junkyards at their residences, both the Aileses and Rouse brought independent Motions in their own counties for relief from their respective judgments pursuant to Ind. R. Tr. P. 60(B), alleging the applicable amortization provision constituted an unconstitutional taking of property and an unreasonable exercise of police power. Both Motions were denied and the parties appealed, raising only the constitutional issue for appellate consideration. Transfer is granted, the opinion of the Court of Appeals is vacated, and the judgments of the trial courts are reversed.

Both appeals were brought on agreed statements of the records and the facts in both cases are undisputed. The Court of Appeals properly set out the facts pertinent to the issue which we adopt for purposes of this opinion as follows:

"FACTS

Both appeals come before us on agreed statements of the records, pursuant to Ind. Rules of Procedure, Appellate Rule 7.3. The facts in both causes are undisputed. The Aileses' real estate, on which they also resided, had been used as a junkyard and automobile wrecking yard since 1967 or 1968, before the effective date of the Decatur County zoning ordinance enacted in 1975 and continued uninterrupted until the date of suit in 1979. In 1975, Decatur County zoned an area, which included the Aileses' residence, for one and two family residences only and prohibited the maintenance of junkyards (Footnote omitted) or automobile wrecking yards (Footnote omitted) within that district. The Aileses do not dispute the use of their real estate in the current manner is proscribed by the ordinance, and the trial court so found. (Footnote omitted.) The trial court also found the use of the real estate constituted a lawful nonconforming use which should have been abated within three years of the ordinance's enactment in 1975 under the following amortization provisions:

'3.23. Any nonconforming use of land not involving any structure,... may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease or structure shall be removed.

3.24. Any building or structure devoted to a nonconforming use with a fair market value of less than $500.00 as determined by the Board of Appeals, may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease and thereafter such building or structure shall be removed or changed to a conforming use.'

On September 18, 1979 the trial court therefore issued an injunction against the use of the property as

a junkyard and ordered removal of the offending materials. The Aileses moved for relief from the judgment challenging the constitutionality of the amortization provisions. The trial court overruled their motion. On appeal, both parties state there is no issue of fact but only an issue of law which questions whether an amortization provision eliminating a 'non-conforming, pre-existing, uninterrupted, otherwise lawful use' of real estate is a taking of property without due process and an unreasonable exercise of police power.

Rouse's appeal presents a similar record. Rouse began using his residential real estate as a junkyard in approximately 1953. In 1970, Ripley County zoned the district including Rouse's real estate for medium density single and two-family residences, where junkyards (Footnote omitted) are not permitted. Rouse does not challenge the trial court's finding that he is maintaining a junkyard in violation of the ordinance, nor does he challenge the applicability of the following amortization provision contained in Section 3.5 of the ordinance:

> 'The lawful use of a building or premises existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided.
>
> ....
>
> (g) Any nonconforming open use of land shall be discontinued within (5) years from the date of passage of this ordinance.' [Footnote omitted].

On August 18, 1978 the trial court issued an injunction ordering removal of all junked equipment and automobiles from Rouse's real estate. Rouse moved for relief from the judgment alleging the amortization provision was unconstitutional. The trial court's

subsequent finding that the challenged provision was not an unconstitutional taking of property without due process of law is the only question raised in Rouse's appeal."

Appellant-Petitioners Ailes and Rouse challenge the respective amortization provisions as an unconstitutional taking of property and as an unreasonable exercise of police power. Petitioners are correct on this issue.

The precise issue of amortization as a means of phasing out non-conforming uses by zoning regulation has not been directly addressed in this jurisdiction. In approving less drastic measures of phasing out, however, strong inferences have been made that such a direct approach would not be acceptable. *Metropolitan Development Commission of Marion County v. Marianos*, (1980) ___ Ind. ___, 408 N.E.2d 1267; *Misner v. Presdorf*, (1981) ___ Ind.___, 421 N.E.2d 684, *transfer denied*; *Jacobs v. Mishawaka Board of Zoning Appeals*, (1979) ___ Ind.App. ___, 395 N.E.2d 834, *trans. denied*; *Dandy Co., Inc. v. Civil City of South Bend*, (1980) ___ Ind.App. ___, 401 N.E.2d 1380. Typically the provisions of the zoning ordinances upheld in those cases and generally approved by this Court and the Court of Appeals allowed a use which was non-conforming to the area to continue with the limitations that exercise of the use could not be expanded or increased beyond its status at the time of the passage of the ordinance, exercise of the use could not be reinstated after there was an abandonment of it in the area by the original user or one successor to it, destruction of the enclosure housing the exercise of the use such as destruction by fire, authorized replacement again to the level existing at the time of enactment of the ordinance and in some cases replacement of that particular non-conforming use with another non-conforming use that fell in the same class of uses as the original non-conforming use. By this method there was a

gradual phasing out of non-conforming uses without taking from the user the right to exercise a use that was lawful prior to the enactment of the ordinance so long as all of the conditions and limitations were met. *Metropolitan Development Commission, supra; Jacobs, supra; Misner, supra.*

In *Jacobs*, the Court of Appeals, in discussing the methods of phasing out non-conforming uses by municipalities in their zoning ordinances, stated:

> "Zoning ordinances contain provisions exempting existing non-conforming uses from the use restrictions because the right of a municipality to enact zoning restrictions is subject to the vested property interest acquired prior to the enactment of the zoning ordinances. An ordinance prohibiting any continuation of an existing lawful use within a zoned area is unconstitutional as a taking of property without due process of law and as an unreasonable exercise of police power."

Jacobs, ___ Ind. at___, 395 N.E.2d at 836.

As the Court of Appeals pointed out in *Jacobs*, a number of jurisdictions have taken this position and found amortization provisions in zoning ordinances respecting non-conforming uses are unconstitutional *per se*.

The Court of Appeals points out in the instant case that though there is a divergence of opinion among the various jurisdictions, the greater weight of authority supports the use of amortization provisions if they are reasonable, usually weighing the private loss against the public gain in each case. *See Annot.*, 22 ALR 3rd 1134 §§3 & 4 (1968 and Supp. 1981) and cases cited therein. The factors to be considered in those approving amortization appear to be the length of time given to phase out the use, the type of business or endeavor exercised, and the nature of the

business or use and its relationship to the neighborhood or area involved. From a constitutional standpoint, it does not appear that a resolution of any of these factors can make that reasonable which is basically and from the outset unreasonable. We must bear in mind that we are dealing with a use of a person's private property that was continuing and lawful at the time of the passage of the ordinance. It became unlawful only by reason of the provisions of the ordinance. The nature of the business, its relationship to the rest of the area, the method in which it is run, its potential success or failure based on the income or lack thereof, are irrelevant considering the narrow issue drawn in the facts before us.

It was suggested in both of the cases involving the Aileses and Rouse, that their premises were nothing more than junk piles, that it was questionable if any business was conducted there since there was little evidence of any income to them, that they represented a blight on the community and the loss to them would be negligible compared to the gain of the public in general and more particularly their neighbors. These factors could not be considered in this issue. These actions in both cases of the Aileses and Rouse were brought only for enjoining zoning ordinance violations and were based solely upon allegations that Appellants' use of their real estate was in violation of the provisions of the zoning ordinances. There is no allegation nor implication in these causes that the real estate of either of the Appellant-Petitioners here constituted a nuisance. As Petitioners point out, the complaints contain absolutely no allegations that Appellants' use of their real estate jeopardize the health and safety of their neighbors and therefore constituted a nuisance or in any other manner constituted a nuisance. If either community of Decatur County or Ripley County has evidence that the use of the properties of the Aileses and

Rouse constitute a nuisance, a blight, or a danger to the health and safety of the community, they have open to them the remedy of pursuing enjoining of petitioners' activities as a nuisance. That issue is not before us here.

As we consistently have held, it is permissible for a community to provide in its zoning ordinances that the lawful use of land that exists at the time of the passage of the ordinance is no longer permissible under the terms of the ordinance, may be continued subject to the provisions that no non-conforming use shall be enlarged or increased or extended to occupy a greater area of land than was occupied at the effective date or adoption of the ordinance or amendment, that once abandoned, the use may not be reinstated or the use may be replaced by one of the same or similar nature and not more restrictive than the use employed. We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power. The opinion of the Court of Appeals is vacated, and the judgments of the trial courts are reversed with instructions to the trial courts to vacate the respective injunctions and orders against the petitioners and enter judgment in favor of these petitioners.

Givan, C.J., and Prentice, J., concur.
DeBruler, J., concurs in result with separate opinion.
Hunter, J., dissents with opinion.

IN THE
SUPREME COURT OF INDIANA

RALPH D. AILES and ELIZABETH J. AILES,	)	
Appellants,	)	
v.	)	
DECATUR COUNTY AREA PLANNING COMMISSION and DECATUR COUNTY BOARD OF ZONING APPEALS,	)	No. 583 S 171
Appellees,	)	
MELVIN T. ROUSE,	)	
Appellant,	)	
v.	)	
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Appellee.	)	

ON PETITION TO TRANSFER

DEBRULER, J.—Concurring in Result

The first step in determining the constitutionality of a statute or ordinance is to extract its meaning, purpose and

scope. *Board of Com'rs. v. Kokomo City Plan Commission*, (1975) 263 Ind. 282, 330 N.E.2d 92. In pertinent part, these ordinances seek to subject a particular type of established non-conforming use to extinguishment by amortization. The Decatur County ordinance applies the amortization technique to uses of "land not involving any structure" and to "Any building or structure . . . with a fair market value of less than $500.00". The Ripley County ordinance applies it to "open use of land" and within the terminology utilized, "land" is either hopelessly ambiguous or it refers to an area without related and appurtenant buildings. At the outset, I am led to the conclusion that neither ordinance is intended to subject an established non-conforming use of a yard surrounding a private residence to extinguishment by amortization. Accordingly, I would vote to reverse these judgments on this legal basis, and await a more appropriate occasion to deal with the constitutional issues, even though the parties may have limited the appeal to them.

IN THE
SUPREME COURT OF INDIANA

RALPH D. AILES and ELIZABETH J. AILES,	)	
Appellants, (Defendants below),	)	
v.	)	
DECATUR COUNTY AREA PLANNING COMMISSION and DECATUR COUNTY BOARD OF ZONING APPEALS,	)	Supreme Court No. 583 S 171
Appellees, (Plaintiffs below),	)	
and	)	Consolidated Cause No. 1-381 A 98
MELVIN T. ROUSE,	)	in the Court of Appeals
Appellant, (Defendant below),	)	
v.	)	
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Appellee. (Plaintiff below).	)	

APPEAL FROM THE DECATUR CUICUIT COURT
THE HONORABLE JOHN A. WESTHAFER, JUDGE
and
APPEAL FROM THE RIPLEY CIRCUIT COURT
THE HONORABLE HENRY A. PICTOR, JUDGE

HUNTER, J.—Dissenting.

I must respectfully dissent from the majority opinion. The ultimate purpose of zoning regulations is to promote the public's health, safety, convenience, and welfare by regulating the uses of private property within certain areas. This has consistently been recognized as a legitimate and constitutionally valid exercise of the state's police power. *Field v. Area Plan Commission of Grant County, Ind.*, (1981) ___ Ind.App. ___, 421 N.E.2d 1132. There must necessarily be some private loss whenever regulations involving the general public welfare are enacted. But courts have almost universally adopted a balancing approach by weighing the private loss against the public gain in each individual case and have consistently upheld restrictive requirements when they have proven to be *reasonable* under the particular facts and circumstances of the case. *Bird v. Delaware Muncie Metropolitan Plan Commission*, (1981) ___ Ind.App. ___, 416 N.E.2d 482.

While zoning legislation may lower the property value or otherwise create hardship for an individual property owner, this loss must be measured against the public's gain, and the individual owner is compensated by sharing in the general public benefit of living in a reasonably regulated society. The decision to terminate nonconforming uses, and the method to be used, should be made by the appropriate legislative body and include a balancing of the loss by the

individual with the public good sought to be achieved. Our standard on review only needs to be the test of "reasonableness." *See Art Neon Co. v. City and County of Denver*, (10th Cir. 1973) 488 F.2d 118, and cases cited therein.

The issue of the amortization of nonconforming uses is of significant consequence to local planning and zoning efforts in this state. An absolute prohibition against amortization will defeat the purpose of zoning efforts, for the gradual elimination of a use not compatible with the public welfare could not be accomplished. I feel that it is obvious that the constitutionality of any fixed period for amortization in each case would depend upon the nature of the nonconforming use, the extent of the private loss, and the amount of time necessary to liquidate the investment in the nonconforming use. These factors must be balanced in each case with the public benefit that will be gained, as measured by the impact of the cessation of the nonconforming use on the environment, health, safety, and welfare of the public. This balancing method is the only way to accord respect to the competing public and private interests.

The case of *Jacobs v. Mishawaka Board of Zoning Appeals*, (1979) ___ Ind.App. ___, 395 N.E.2d 834, is not controlling on the issue of amortization of nonconforming uses as that case dealt with an alleged *expansion* of a nonconforming use; it did not involve an amortization period. While it may be true as pointed out in that case that an ordinance prohibiting *any* continuation of an existing lawful use is unconstitutional, amortization is a method for the *gradual* elimination of the nonconforming use and does not constitute an immediate restriction to a vested property interest. The rapidity of the elimination of the nonconforming use would depend upon the length of the period of amortization and if the period were too short in

duration to accommodate the property owner, the period would be unconstitutional as applied and the individual's due process rights are thus protected. Amortization periods are not always "rapid" and come in many different lengths and types. The case-by-case balancing method of review is as necessary in amortization cases as it is in other areas of zoning problems.

I agree with Judge Miller's reasoning and conclusions in the instant case:

> "[T]he greater weight of authority supports the use of amortization provisions if they are reasonable, usually weighing the private loss against the public gain in each case. *See Annot.*, 22 A.L.R. 3d 1134 §§ 3, 4 (1968 & Supp. 1981).
>
> "We find this latter approach to be the more well-reasoned view under the circumstances before us. The absolute prohibition of amortization may unnecessarily impede the legitimate goal of zoning to eliminate nonconforming uses in the public interest.
>
> * * *
>
> "In theory, amortization provides a grace period in which the user may continue the nonconforming use, amortize the investment and make future plans. The amortization period may well provide the user with more time than necessary to realize the economic life of the nonconforming use. This factor is not dispositive, however, and may have no applicability to the open use of land, as opposed to the use of a structure. Several elements must therefore be considered in determining the reasonableness of a given amortization provision as applied to particular circumstances. For example, the public benefit may be determined by considering the offensiveness of the nonconforming use in view of the surrounding

neighborhood; the private loss may be measured by the value of the nonconforming use, the damages incurred by compliance including the hardship imposed on the user, and the length of time allowed for amortization. *Annot.*, 22 A.L.R. 3d 1134, *supra*.

"In the record before us, there is no evidence indicating the degree, if any, of hardship or loss to the landowners which will be occasioned by compliance with the zoning ordinances.

* * *

"Neither the Aileses nor Rouse present a record of any evidence on these factors which would allow this Court to balance the interests involved and determine the reasonableness of the amortization provisions as applied to their property. On the other hand, we are confronted with the inherently debilitating effects of maintaining a junkyard in a residential neighborhood and the resultant legitimate interests of the state in eliminating nonconforming uses for the public welfare. We find the amortization provisions at issue in the instant case are not unconstitutional per se.

"We do not hold all amortization provisions are constitutional per se or as applied under all circumstances. Even an amortization provision valid on its face may be found unconstitutional as applied to a particular parcel of real estate after weighing the pertinent factors, some of which are enumerated above. The rule of reasonableness must prevail, considering the public gain versus the private loss. As in all zoning cases, each case must be decided on its own facts. *Nelson v. Board of Zoning Appeals of Indianapolis*, (1959) 240 Ind. 212, 162 N.E.2d 449; *Jacobs v. Mishawaka Board of Zoning Appeals, supra*." *Ailes v. Decatur County Area Planning Com'n*, (1982) ___ Ind.App. ___, 437 N.E.2d 1375, 1379-80 [footnotes omitted].

I would deny transfer and affirm the judgment of the trial court.

APPENDIX B

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE
INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 583 S 171

Ralph D. Ailes, et al v.
Decatur County Area Planning Comm.

You are hereby notified that the Supreme Court has on this day denied "Appellee's Petition for Rehearing" of Ripley County Area Plan Commission. Givan, C. J. Hunter, J., would grant. Denied "Petition for Rehearing" of Decatur County Area Plan Commission the Decatur County Board of Zoning Appeals. Givan, C. J., Hunter, J. would grant. Granted Metropolitan Development Commission of Marion County, Indiana's "Motion for Leave to File Brief of An Amicus Curiae". Given, C. J., Prentice, J., would deny.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court, this 4th day of August, 1983.

/s/ *Marjorie H. O'Laughlin*
Clerk Supreme Court and Court of Appeals

August 3, 1983

No. 583 S 171

Jack R. Shields, Batesville
William O. Smith & George R. Watts, Greensburg
Stephen T. Taylor, Versailles
John P. Ryan, Indpls.
Sue Ann Hartig, Evansville
Charles A. Ruchman, Gary
Bruce O. Boxberger, Ft. Wayne

APPENDIX C

RALPH D. AILES and ELIZABETH J. AILES,
Appellants (Defendants Below),

v.

DECATUR COUNTY AREA PLANNING COMMISSION and Decatur County Board of Zoning Appeals,
Appellees (Plaintiffs Below).

and

MELVIN T. ROUSE,
Appellant (Defendant Below),

v.

RIPLEY COUNTY AREA PLAN COMMISSION,
Appellee (Plaintiff Below).

No. 1-381A98

Court of Appeals of Indiana,
Fourth District.

July 28, 1982.

MILLER, Presiding Judge.

This is a consolidated appeal challenging the constitutionality of amortization provisions in the zoning ordinances of two different counties, both of which require the discontinuance of pre-existing lawful nonconforming uses of real estate upon the expiration of a specific number of years. After injunctions were issued against appellants (Ralph and Elizabeth Ailes and Rouse) enjoining them from operating junkyards at their residences, both the Aileses and Rouse brought independent motions for relief from their respective judgments, pursuant to Ind. Rules of Procedure, Trial Rule 60(B), alleging the applicable amortization provision constituted an unconstitutional

taking of property and an unreasonable exercise of police power. Both motions were denied, and the parties appeal raising only the constitutional issue for our consideration.[1] We affirm.

FACTS

Both appeals come before us on agreed statements of the records, pursuant to Ind. Rules of Procedure, Appellate Rule 7.3. The facts in both causes are undisputed. The Aileses' real estate, on which they also resided, had been used as a junkyard and automobile wrecking yard since 1967 or 1968, before the effective date of the Decatur County zoning ordinance enacted in 1975 and continued uninterrupted until the date of suit in 1979. In 1975, Decatur County zoned an area, which included the Aileses' residence, for one and two family residences only and prohibited the maintenance of junkyards[2] or automobile

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[1] On appeal Rouse adopted the Aileses' brief. Each county planning commission filed a separate appellee's brief. Separate reply briefs were filed by Rouse and the Aileses.

[2] Section 1.18 of the Decatur County Comprehensive Area Plan and Zoning Ordinance of 1975 defines "junkyard" as: "An open area or fenced in enclosure, where used or second hand materials are bought, sold, exchanged, stored, baled, packed, disassembled or handled including but not limited to appliances, scrap iron and other metals, paper, rags, rubber tires, and bottles. A junk yard includes an automobile wrecking yard, but does not include uses established entirely within enclosed buildings." The Aileses' real estate includes a detached garage-like structure which the parties agree is in a state of disrepair and has a negligible fair market value. In its findings of fact, the trial court found the Aileses were storing the offending material both inside and outside this structure, and that the structure itself constituted junk. Although the Aileses raise an objection to this characterization of the "structure," we note the amortization provisions at issue also require discontinuance of prior nonconforming uses of structures as well as open land. See 3.24 of the Ordinance quoted infra.

wrecking yards[3] within that district. The Aileses do not dispute the use of their real estate in the current manner is proscribed by the ordinance, and the trial court so found.[4] The trial court also found the use of the real estate constituted a lawful nonconforming use which should have been abated within three years of the ordinance's enactment in 1975 under the following amortization provisions:

> "3.23. Any nonconforming use of land not involving any structure, . . . may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease or structure shall be removed.
>
> 3.24. Any building or structure devoted to a nonconforming use with a fair market value of less than $500.00 as determined by the Board of Appeals, may be continued for a period not to exceed three years after enactment of the ordinance, whereupon such nonconforming use shall cease and thereafter such building or structure shall be removed or changed to a conforming use."

---

[3] Section 1.7 of the Ordinance defines an "automobile wrecking yard" as: "Any area where two or more motor vehicles, not in running condition, or parts thereof, are stored in the open and are not being restored to operation; or any land, building or structure used for the wrecking or storing of such motor vehicles, or parts thereof, not in running condition."

[4] The trial court specifically found: "Defendants are storing on their property, both out in the open and within a structure: (a) Two or more motor vehicles (including boats, vans, trucks, cars, and tractors), not in running condition, or parts thereof; (b) Various used and second hand materials, debris, junk, trash, engines and motors, barrels, parts of appliances, scrap metal, rags, broken bottles, garbage, salvaged items, waste materials, used tires, and other unsightly objects." There was no request in the record for specific findings of fact.

On September 18, 1979 the trial court therefore issued an injunction against the use of the property as a junkyard and ordered removal of the offending materials. The Aileses moved for relief from the judgment challenging the constitutionality of the amortization provisions. The trial court overruled their motion. On appeal, both parties state there is no issue of fact but only an issue of law which questions whether an amortization provision eliminating a "non-conforming, pre-existing, uninterrupted, otherwise lawful use" of real estate is a taking of property without due process and an unreasonable exercise of police power.

Rouse's appeal presents a similar record. Rouse began using his residential real estate as a junkyard in approximately 1953. In 1970, Ripley County zoned the district including Rouse's real estate for medium density single and two-family residences, where junkyards[5] are not permitted. Rouse does not challenge the trial court's finding that he is maintaining a junkyard in violation of the ordinance, nor does he challenge the applicability of the following amortization provision contained in Section 3.5 of the ordinance:

> "The lawful use of a building or premises existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided.

---

[5] The record does not contain a copy of the definition of "junkyard" under the Ripley County Zoning Ordinance-Master Plan Ordinance of 1970. However, in its statement of facts, the Ripley Commission asserts: "The Ordinance defines junkyard as a place usually outdoors, where waste or discarded used property other than organic matter is accumulated and/or stored and is or may be salvaged for reuse or resale, including but not limited to, one or more unlicensed or inoperable motor vehicles, or farm machinery or equipment of any kind." In his reply brief, Rouse adopted the Commission's statement of facts.

. . . .

(g) Any nonconforming open use of land shall be discontinued within (5) years from the date of passage of this ordinance."[6]

On August 8, 1978 the trial court issued an injunction ordering removal of all junked equipment and automobiles from Rouse's real estate. Rouse moved for relief from the judgment alleging the amortization provision was unconstitutional. The trial court's subsequent finding that the challenged provision was not an unconstitutional taking of property without due process of law is the only question raised in Rouse's appeal.

DECISION

The Aileses and Rouse challenge the respective amortization provision as an unconstitutional taking of property and as an unreasonable exercise of police power. It is well established, however, that reasonable zoning regulations are a proper exercise of police power and are not unconstitutional merely because they regulate the uses of private property. *Town of Homecroft v. Macbeth*, (1958) 238 Ind. 57, 148 N.E.2d 563; *Field v. Area Plan Commission of Grant County*, (1981) Ind.App., 421 N.E.2d 1132; *Metropolitan Board of Zoning Appeals v. Sheehan Construction Co.*, (1974) 160 Ind.App. 520, 313 N.E.2d 78. The ultimate purpose of zoning regulations is to confine certain classes of uses and structures to specific areas, *Jacobs v. Mishawaka Board of Zoning Appeals*, (1979) Ind.App., 395 N.E.2d 834, thereby insuring and promoting the public's health, safety, convenience and welfare. *Board of Zoning Appeals of New Albany v. Koehler*, (1963) 244 Ind.

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[6] There is no structure involved in Rouse's use of his property as a junkyard.

504, 194 N.E.2d 49. It is the express goal of zoning legislation to encourage enactment of zoning ordinances "to the end that highway systems be more carefully planned, that new communities grow only with adequate street, utility, health, educational and recreational facilities; that the needs of agriculture, industry, and business be recognized in future growth, [and] *that residential areas provide healthy surroundings for family life....*" (Emphasis added.) Ind.Code 18-7-4-1 *et seq.*, repealed by Acts 1974, P.L. 75, §3; 1978 P.L. 95, §4, 1979 P.L. 178 §164 and substantially reenacted at Ind.Code 36-7-4-201. To accomplish these objectives, a zoning regulation may control the use of land and structures in a particular locality, but it must be within the limitations imposed by statutory and constitutional provisions, and it must have a real and substantial relation to the public health, safety, or general welfare. *Field v. Area Plan Commission of Grant County, supra*, at 1138 quoting 30 I.L.E. *Zoning* §8 at 647 (1960); *accord* 101 C.J.S. *Zoning* §54 (1958).

In the instant case, we are specifically concerned with the zoning of residential areas and the regulation of prior nonconforming uses. It is well settled that zoning of family residential areas bears a substantial relationship to the public safety and general welfare. *Field v. Area Plan Commission of Grant County, supra*; *Antrim v. Hohlt*, (1952) 122 Ind.App. 681, 108 N.E.2d 197. Exclusion of commercial and industrial uses of land and structures in residential areas ensures the quiet of natural surroundings and vegetation, and decreases the risk of various annoyances from competing usages. *Antrim v. Hohlt, supra*. We have also previously recognized the inherent rationale for excluding junkyards specifically from residential zones:

> "[The maintenance of a junkyard in a residential area] may well destroy the value of [the] neighbors'

property, provide an attractive nuisance for neighborhood children, lure uninvited scavengers, provide cover and breeding grounds for rodents and insects, and generally constitute a threat to the health, safety and welfare of neighborhood residents."

Field v. Area Plan Commission of Grant County, supra, at 1139, fn. 6. Junked automobiles are particularly recognized as presenting a considerable health and safety hazard. As explained in *Lachapelle v. Goffstown*, (1967) 107 N.H. 485, 225 A.2d 624 (upholding an amortization provision applied to a junkyard in a residential zone), they tend to still have gasoline in their tanks, children are attracted to them, they may fall if disturbed and they tend to create neighborhood blight. Consequently, the state has a reasonable and legitimate interest in zoning areas for solely residential use and in excluding junkyards from residential areas. *Field v. Area Plan Commission of Grant County, supra*; *Antrim v. Hohlt, supra*.

Under many ordinances, however, proof of a prior nonconforming use[7] constitutes a defense to an action alleging a violation of a zoning ordinance. Generally, zoning ordinances have no retroactive effect and work no disturbance with existing property uses. *Dandy Co., Inc. v. Civil City of South Bend*, (1980) Ind.App., 401 N.E.2d 1380. Thus, the right of a municipality to enact zoning restrictions is subject to vested property interests. *Jacobs v. Mishawaka Board of Zoning Appeals, supra*, and consequently, as emphasized by the Aileses and Rouse, an ordinance prohibiting any continuation of a pre-existing

[7] A prior non-conforming use is defined as a use of premises which lawfully existed prior to the enactment of a zoning ordinance and which is allowed to continue after the ordinance's effective date although it does not comply with the use restrictions applicable in the area. *Jacobs v. Mishawaka Bd. of Zoning Appeals, supra*.

lawful use is unconstitutional as a taking of property without due process of law and as an unreasonable exercise of police power. *Id.*

Generally, however, nonconforming uses are not favored since they impede the attainment of the legitimate purpose of zoning ordinances to secure the gradual or eventual elimination of such uses, *Id.*; *Misner v. Presdorf*, (1981) Ind.App., 421 N.E.2d 684, and zoning ordinances routinely employ various methods to eliminate such uses, including the prohibition of resumption of the nonconforming use after abandonment or destruction of nonconforming structures, and the prohibition of alterations or expansion of nonconforming uses. *Jacobs v. Mishawaka Board of Zoning Appeals, supra*. E.g., *Fidelity Trust Co. v. Downing*, (1946) 224 Ind. 457, 68 N.E.2d 789 (dilapidated refreshment stand destroyed by fire could not be reconstructed); *Chizum v. Elkhart County Plan Commission*, (1970) 147 Ind.App. 691, 263 N.E.2d 654 (erection of lightpoles along dragstrip was an illegal extension of nonconforming use). These methods have withstood constitutional attack in view of the public interest. *See Misner v. Presdorf, supra* (where the Court found an ordinance prohibiting expansion of a nonconforming use was not an unconstitutional taking); 101 C.J.S. *Zoning* §63 (1958).

While amortization, the method used in the instant case to eliminate prior nonconforming uses upon the expiration of a specific period of time, has not been specifically challenged in this jurisdiction, it is, however, a method commonly employed in other jurisdictions. *See Annot.*, 22 A.L.R.3d 1134 (1968). There is a divergence of opinion among our sister states concerning the constitutionality of amortization provisions. Although a few states have concluded this method is unconstitutional *per se*, *e.g.*, *DeMull v. Lowell*, (1962) 368 Mich. 242, 118 N.W.2d 232;

Hoffman v. Kinealy, (1965) Mo., 389 S.W.2d 745; *United Advertising Corp. v. Raritan*, (1952) 11 N.J. 144, 93 A.2d 362; *Sun Oil Co. v. Upper Arlington*, (1977) 55 Ohio App.2d 27, 379 N.E.2d 266, the greater weight of authority supports the use of amortization provisions if they are reasonable, usually weighing the private loss against the public gain in each case. *See Annot.*, 22 A.L.R.3d 1134 §§ 3, 4 (1968 & Supp. 1981).

We find this latter approach to be the more well-reasoned view under the circumstances before us. The absolute prohibition of amortization may unnecessarily impede the legitimate goal of zoning to eliminate nonconforming uses in the public interest. As explained in *Lachappelle v. Goffstown*, *supra*:

> "We believe that the rigid approach taken by [those cases finding amortization unconstitutional per se] has a debilitating effect on effective zoning, unnecessarily restricts the police power and prevents the operation of a reasonable and flexible method of eliminating nonconforming uses in the public interest. It is impossible to treat this problem in the abstract or to apply the same time limitation to all nonconforming uses. However, this should not prevent reasonable attempts to discourage the continuation of nonconforming uses in the process of furthering an important public need without confiscatory damage to the landowner."

Id. at 488-89, 225 A.2d at 627.

In theory, amortization provides a grace period in which the user may continue the nonconforming use, amortize the investment and make future plans. The amortization period may well provide the user with more time than necessary to realize the economic life of the nonconforming use. This factor is not dispositive, however, and may have no applicability to the open use of land, as opposed to the use

of a structure. Several elements must therefore be considered in determining the reasonableness of a given amortization provision as applied to particular circumstances. For example, the public benefit may be determined by considering the offensiveness of the nonconforming use in view of the surrounding neighborhood; the private loss may be measured by the value of the nonconforming use, the damages incurred by compliance including the hardship imposed on the user, and the length of time allowed for amortization. *Annot.*, 22 A.L.R.3d 1134, *supra*.

In the record before us, there is no evidence indicating the degree, if any, of hardship or loss to the landowners which will be occasioned by compliance with the zoning ordinances.[8] A similar problem was presented in the *Board of Supervisors v. Miller*, (1969) Iowa, 170 N.W.2d 358, where an amortization provision requiring discontinuance of an automobile-wrecking yard within five years was found reasonable and a constitutional exercise of police power, in the absence of any evidence regarding the value or investment involved, or the extent of hardship invoked by compliance. *See also State v. Joyner*, (1974) 23 N.C.App. 27, 208 S.E.2d 233, where the court held the owner must show the loss occasioned by compliance and upheld a three year amortization applied to a salvage yard in the absence of such evidence. Neither the Aileses nor Rouse present a record of any evidence on these factors which would allow this Court to balance the interests involved and determine the reasonableness of the amortization provisions as applied to their property.[9] On the other hand, we are

[8] Indeed, the removal of the offending materials may well increase the value and marketability of their real estate as residential property.

[9] It does not appear that the Aileses or Rouse ever presented the issue directly to their zoning boards. Where a person seeks to challenge the constitutionality of a zoning ordinance as applied to their property, the issue must first be presented to the board of zoning appeals. E.g., *Town of Homecroft v. Macbeth*, *supra*; *Board of Zoning Appeals of New Albany v. Kuehler*, *supra*.

confronted with the inherently debilitating effects of maintaining a junkyard in a residential neighborhood and the resultant legitimate interests of the state in eliminating nonconforming uses for the public welfare. We find the amortization provisions at issue in the instant case are not unconstitutional *per se*.

We do not hold all amortization provisions are constitutional *per se* or as applied under all circumstances. Even an amortization provision valid on its face may be found unconstitutional as applied to a particular parcel of real estate after weighing the pertinent factors, some of which are enumerated above. The rule of reasonableness must prevail, considering the public gain versus the private loss. As in all zoning cases, each case must be decided on its own facts. *Nelson v. Board of Zoning Appeals of Indianapolis*, (1959) 240 Ind. 212, 162 N.E.2d 449; *Jacobs v. Mishawaka Board of Zoning Appeals, supra*.

The judgment of the trial court is affirmed.

CONOVER, J., concurs.

YOUNG, J., dissents with opinion.

YOUNG, Judge, dissenting.

I dissent.

The so-called "amortization" provision in the two ordinances is a taking of property without due process. Therefore, it is an unreasonable exercise of police power and unconstitutional *per se*. *See* e.g., *Hoffman v. Kinealy*, (1965) Mo., 389 S.W.2d 745; *Sun Oil Co. v. City of Upper Arlington*, (1977) 55 Ohio App.2d 27, 379 N.E.2d 266. The state and its cities and towns have a legitimate interest in the elimination of prior nonconforming uses. The method of elimination, however, must be reasonable. Here it is not reasonable. Any public gain realized by the use of amortization provisions is outweighed by the private loss. I would reverse.

APPENDIX D

STATE OF INDIANA	)	IN THE RIPLEY CIRCUIT
	)	COURT
	)SS:	
COUNTY OF RIPLEY	)	GENERAL TERM, 1978
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Plaintiff,	)	
VS.	)	CAUSE NO. C-77-128
MELVIN T. ROUSE,	)	
Defendant.	)	

INJUNCTION AND JUDGMENT

Evidence was presented in this Court on May 26, 1978. Defendant's attorney filed a Trial Brief and Plaintiff's attorney was given an opportunity to file one. His brief was filed on June 21, 1978. The Court having duly considered the evidence, arguments of counsel and briefs submitted now finds that Defendant, Melvin T. Rouse, is operating a junkyard on certain real estate owned by him in Ripley County, State of Indiana. The Court further finds that said real estate was originally zoned R-2 on June 15, 1970 and that said zoning classification remains unchanged to the present time. The Court now concludes that judgment should be for Plaintiff and that Defendant should remove his junkyard from said real estate.

IT IS THEREFORE ORDERED that Plaintiff have and recover judgment from Defendant. Costs are assessed against Defendant.

IT IS FURTHER ORDERED that Defendant be and he hereby is enjoined from operating and maintaining his junkyard on his real estate located in Franklin Township, Ripley County, Indiana, to-wit:

Part of the Southeast Quarter of Section 15, Township 8 North, Range 12 East, containing .90 of an acre, more or less.

ALSO, Part of the Southeast Fourth of the Southeast Quarter of Section 15, Town 8 North, Range 12 East, containing 51/100 acres, more or less.

ALSO, Part of the Southwest Fourth of the Southeast Quarter of Section 15, Town 8 North, Range 12 East, containing 1.91 acres, more or less.

IT IS THEREFORE ORDERED that Defendant commence the removal of junk automobiles and junk equipment immediately. He is hereby given a period of ninety (90) days in which to complete the removal of all of said junk automobiles and junk equipment.

SO ORDERED this 8th day of August, 1978.

/s/ *Henry A. Pictor*
Henry A. Pictor, Judge
Ripley Circuit Court

APPENDIX E

STATE OF INDIANA	)	IN THE RIPLEY CIRCUIT
	)	COURT
	)SS:	
COUNTY OF RIPLEY	)	GENERAL TERM, 1980
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. C-77-128
MELVIN T. ROUSE,	)	
Defendant.	)	

ORDER

Arguments were presented by the attorneys on September 18, 1980. The Court found that the Motion for Relief From Judgment should be considered in view of the fact that defendant asserted a change in the constitution rather than simply a change in the law. The Court further found that the Ripley County Zoning Ordinance as it applied to defendant's real estate in the present case is constitutional. The Court specifically found that no structures were involved in defendant's nonconforming use of his real estate.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Relief From Judgment be and it is hereby overruled and denied.

SO ORDERED and dated this 18 day of September, 1980.

/s/ *Henry A. Pictor*
Henry A. Pictor, Judge
Ripley Circuit Court

Copy to: Johnson & Eaton
Jack Shields

APPENDIX F

STATE OF INDIANA	)	IN THE RIPLEY CIRCUIT COURT
	)	
	)SS:	
COUNTY OF RIPLEY	)	GENERAL TERM, 1981
RIPLEY COUNTY AREA PLAN COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CAUSE NO. C-77-128
	)	
MELVIN T. ROUSE,	)	
	)	
Defendant.	)	

ORDER ON MOTION TO CORRECT ERRORS

On August 8, 1978, this Court ORDERED an injunction. On September 13, 1980, defendant filed a Motion for Relief From Judgment. That motion was argued before the Court. At the argument the Court advised the attorneys that specific findings would be made by the Court. The Court's Order of September 18, 1980, failed to detail any such findings. On November 18, 1980, defendant filed a Motion to Correct Errors. As directed by the Court both plaintiff and defendant have filed proposed findings of fact.

The Court now concludes that the Order of September 18, 1980, should be corrected and that specific findings of fact should now be made. The Court now finds:

1. Defendant is now and, at all times relevant to the present suit, was the owner of the following described real estate in Franklin Township, Ripley County, Indiana.

> Part of the Southeast Quarter of Section Fifteen (15), Township Eight (8) North, Range Twelve (12) East, containing ninety hundreths (.90) of an acre, more or

less. ALSO, part of the Southeast Fourth of the Southeast Quarter of Section 15, Township 8 North, Range 12 East, containing fifty-one hundredths (.51) of an acre, more or less. ALSO, part of the Southwest Fourth of the Southeast Quarter of Section 15, Township 8 North, Range 12 East, containing one and ninety-one hundredths (1.91) acres, more or less.

2. On June 15th, 1970, the Ripley County Commissioners adopted the Unified Zoning Ordinance and master plan for Ripley County, and that at all times thereafter said Unified Zoning Ordinance has been in effect.

3. Pursuant to the Unified Zoning Ordinance hereinabove referred to, the defendant's real estate in classified as R-2.

4. Defendant's use of the real estate subject hereof as a junk yard began prior to the effective date of the Ripley County Zoning Ordinance of 1970.

5. Defendant's use of the real estate subject hereof as a junk yard, existed on the effective date of the Ripley County Zoning Ordinance of 1970.

6. Defendant's use of the real estate subject hereof as a junk yard, has continued uninterrupted since the effective date of the Ripley County Zoning Ordinance of 1970.

7. Said Section 3.5 of the Ripley County Zoning Ordinance of 1970, insofar as it attempts to terminate a legal nonconforming, preexisting use of real estate, and specifically the wording of said section, which reads as follows:

> "The lawful use of a building or premises, existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided."...

"(g) any nonconforming open use of the land shall be discontinued within five (5) years from the date of passage of this ordinance."

is constitutional in its application to the use by defendant of his real estate.

8. No structures of buildings ever were or are now involved in defendant's nonconforming use of his real estate.

The Court now concludes as a matter of law that no relief should be granted from this Court's judgment of August 8, 1978.

IT IS THEREFORE SO ORDERED AND ADJUDGED. Defendant's Motion for Relief From Judgment is hereby again overruled and denied.

SO ORDERED and dated this 15th day of April, 1981.

/s/ Henry A. Pictor
Henry A. Pictor, Judge
Ripley Circuit Court

Copy to: Stephen Taylor
Jack Shields

Office - Supreme Court, U.S.
FILED
FEB 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-942

IN THE

Supreme Court of the United States

October Term, 1983

RIPLEY COUNTY AREA PLAN COMMISSION,

Petitioner

vs.

MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the petitioner Ripley County Area Plan Commission has properly invoked this Court's jurisdiction to review the decision of the Supreme Court of Indiana pursuant to 28 U.S.C. §1257(3) where the zoning ordinance under question was not specifically challenged on federal constitutional grounds in the courts below and neither the Supreme Court nor the Court of Appeals nor the trial court of Indiana specifically based their decisions upon the United States Constitution.

Whether a local zoning ordinance which requires the termination of an owner's pre-existing, uninterrupted and otherwise lawful nonconforming use of land within five (5) years of the date of the zoning ordinance violates the owner's right not to be deprived of his property without just compensation guaranteed to him by Article One, Section 21 of the Constitution of the State of Indiana.

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No. 83-942

IN THE

Supreme Court of the United States

October Term, 1983

RIPLEY COUNTY AREA PLAN COMMISSION,

Petitioner

vs.

MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Melvin T. Rouse respectfully requests that the Supreme Court of the United States deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana to review the judgment and opinion entered by that Court on May 12, 1983.

PARTIES

The parties to this Petition are the Ripley County Area Plan Commission and Melvin T. Rouse.[1]

OPINIONS BELOW

The opinions of the Ripley County, Indiana Circuit Court are printed in petitioner's Appendix at D-1 *et seq.*, E-1 *et seq.*, and F-1 *et seq.* The opinion of the Court of Appeals of Indiana is printed in petitioner's Appendix at C-1 and is reported in 437 N.E.2d 1375 (1982). The opinion of the Supreme Court of Indiana is printed in petitioner's Appendix at A-1 *et seq.*, and is reported at 448 N.E.2d 1057 (1983).

CONSTITUTIONAL PROVISIONS, STATUTE AND ORDINANCE INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

---

[1] In the Supreme Court of Indiana two separate cases were consolidated for purposes of appeal inasmuch as each case raised the identical issue. The case of *Decatur County Area Plan Commission versus Ralph D. Ailes and Elizabeth Ailes*, however, is not before this Court on this petition for a writ of certiorari. Only the case of *Ripley Area Plan Commission v. Melvin T. Rouse* is involved in this Petition.

Indeed, it is questionable whether petitioner Ripley County Area Plan Commission intended to pursue this matter in this Court. According to the Application For Extension Of Time In Which To File Petition To Intervene and Petition For Writ Of Certiorari filed by *amicas curiae*, Metropolitan Development Commission of Marion County, counsel for Ripley County informed Mark Dall, counsel for *amicas curiae*, that Ripley County decided not to seek certiorari review in this Court. However, when the *amicas curiae* agreed to provide legal counsel and to pay for the costs of pursuing this petition, apparently Ripley County acceded to the request of *amicas curiae* to file this petition for writ of certiorari. Presently, counsel of record for the petitioner is the same counsel who represented the *amicas curiae* in the Supreme Court of Indiana. Thus, whether there is a true case or controversy between the named parties is open to question.

are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article One, Section 21 of the Constitution of Indiana provides:

> No man's particular services shall be demanded without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

The relevant sections of the Ripley County Zoning Ordinance of 1970 provide:

> Section 3.5:
>
> The lawful use of a building or premises, existing at the time of passage of the ordinance, may be continued although such use does not conform to all the provisions of this ordinance or amendments to this ordinance except as hereinafter provided.
>
> ****
>
> (g) Any nonconforming open use of land shall be discontinued within five (5) years from the date of passage of this ordinance.

28 U.S.C. §1257 provides, in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ****
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

STATEMENT OF THE CASE

Respondent Rouse accepts the petitioner's Statement of the Case set forth in its petition for a writ of certiorari at pp. 4-5. Additionally, however, respondent draws the Court's attention to petitioner's original Complaint, paragraph 9, wherein it is alleged that respondent's use of his property "constitutes a nuisance and should be abated." In its judgment, the trial court did not find that respondent's use of his property constituted a nuisance but only that it violated the zoning ordinance. (R. 3, 4, 5) This finding was not disturbed on appeal.

REASONS FOR DENYING THE WRIT

A.

Petitioner Ripley County Area Plan Commission [hereinafter referred to as "Ripley County"] asserts that the Supreme Court of Indiana determined, as a matter of federal constitutional law, that the termination of pre-existing nonconforming uses of real estate through a technique referred to as "amortization" violated due process of law. Petition for writ of certiorari at 6. Based upon this interpretation of the opinion of the Supreme Court of Indiana, petitioner asserts that its Petition squarely raises the issue of: "Whether amortization, as a means to phase out pre-existing lawful uses rendered non-conforming by a zoning ordinance, is *per se* a taking of property without due process of law under the Fourteenth Amendment to the United States Constitution." *Id.* at 2. A review of the record and of the opinions of the courts below

belies this contention and undermines the assertion of jurisdiction over this cause under 28 U.S.C. §1257(3).

The pleadings in this case disclose that the plaintiff-petitioner Ripley County filed a "Complaint for Injunction" wherein it sought an order enjoining respondent Rouse from continuing to violate the recently enacted zoning ordinance which prohibited him from utilizing his land for the purpose of operating a junkyard. (R. 8-9) Rouse answered the Complaint by alleging that the enforcement of the ordinance was "not permissible" inasmuch as it constituted a "prohibited retroactive application of the ordinance."[2] Thus, at the close of the issues, a challenge to the constitutionality of the zoning ordinance was not placed before the trial court. Judgment was entered on August 8, 1978, wherein the trial court found that Rouse was in violation of the zoning ordinance and ordered Rouse to remove all automobiles and equipment from his property within ninety (90) days. (R. 3) Approximately two (2) years later, Rouse filed his Motion for Relief From Judgment in which he alleged, *inter alia*: "That the Courts in Indiana, since the granting of the injunction and judgment herein on August 8, 1978, have rejected "amortization" as a constitutional method for elimination of pre-existing, non-conforming uses in zoning ordinance [sic], and therefore, the specific provision of the Ripley County Zoning Ordinance of 1970 as it applies to the defendant in the case at bar, is unconstitutional *under the present law of the State of Indiana.*" (R. 15). In support of this contention, Rouse relied upon Indiana appellate court cases which hold that, as a matter of Indiana state law, zoning ordinances may not prohibit the continuation of existing, lawful uses of real property and that ordinances which contravene this principle represent an unreasonable exercise of police power. (R. 11-16). *See*, e.g., *Jacobs v. Mishawaka Board of Zoning Appeals*, Ind.App., 395 N.E.2d 834 (1979). The trial

[2]Rouse also alleged that Ripley County's action was improper under the doctrine of laches, an issue which is not before the Court.

court rejected these arguments and found "that the Ripley County Zoning Ordinance as it applied to defendant's real estate in the present case is constitutional". (R. 4, 5). Thereafter, Rouse reasserted these State law arguments in his Motion to Correct Errors (R. 18-21), and the trial court again rejected his contentions. *See*, Order on Motion to Correct Errors, App. at F-1—F-3.

On appeal to the Court of Appeals of Indiana, Rouse reasserted his contention that amortization constituted a taking of his property without just compensation, thereby violating his right to due process. Again, no reliance was specifically placed upon the Fourteenth Amendment to support his contention, and the authorities upon which he relied were not grounded in federal due process. *See*, Brief of defendant-appellant at 12-19; Reply Brief of defendant-appellant at 3-4. Moreover, the opinion of the court of appeals upholding the constitutionality of the Ripley County zoning ordinance is devoid of *any* reference to the Fourteenth Amendment to the United States Constitution. (App. at C-1—C-11). Rather, the court of appeals simply concluded that "the amortization provisions at issue in the instant case are not unconstitutional *per se*." *Id.* at C-11. Rouse's petition for rehearing before the Court of Appeals alleged that the opinion was without factual support in the record and failed to respect his constitutional rights. However, again no reliance was placed upon the Fourteenth Amendment.

Rouse then filed his Petition To Transfer in the Supreme Court of Indiana, in which he contended that the Indiana common law of zoning prohibited the use of amortization to terminate pre-existing, nonconforming uses of real estate and that this technique was violative of a landowner's constitutional rights.[3] At oral argument, before the Supreme Court, Rouse clarified the constitutional basis of

[3]The briefs filed by the parties in the Court of Appeals were filed in the Supreme Court of Indiana without alteration.

his contentions by reference to Article One, Section 21 of the Constitution of the State of Indiana, which provides in relevant part: "No man's property shall be taken by law without just compensation." Again, no reliance was placed upon the Fourteenth Amendment to support Rouse's "constitutional" argument, and the remainder of his legal contention rested on the Indiana common law of zoning.

In rendering its decision, the Indiana Supreme Court held "...that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power." (App. at A-8). Nowhere in the opinion of the Supreme Court is reference made to the Fourteenth Amendment and nowhere does the Court even hint that its decision is grounded in anything other than Indiana law.[4]

---

[4]For example, the Court alludes to a number of Indiana appellate court decisions which infer disapproval for rapid termination of nonconforming uses.

The precise issue of amortization as a means of phasing out nonconforming uses by zoning regulation has not been directly addressed in this jurisdiction. In approving less drastic measures of phasing out, however, strong inferences have been made tht such a direct approach would not be acceptable. *Metropolitan Development Commission of Marion County v. Marianos*, (1980) ___ Ind. ___, 408 N.E.2d 1267; *Misner v. Presdorf*, (1981) ___ Ind. ___, 421 N.E.2d 684, *transfer denied*; *Jacobs v. Mishawaka Board of Zoning Appeals*, (1979) ___ Ind.App. ___, 395 N.E.2d 884, *trans. denied*; *Dandy Co., Inc. v. Civil City of South Bend*, (1980) ___ Ind.App. ___, 401 N.E.2d 1380. Typically the provisions of the zoning ordinances upheld in those cases and generally approved by this Court and the Court of Appeals allowed a use which was nonconforming to the area to continue with the limitations that exercise of the use could not be expanded or increased beyond its status at the time of the passage of the ordinance, exercise of the use could not be reinstated after there was an abandonment of it in the area by the original user or one successor to it, destruction of the enclosure housing the exercise of the use such as destruction by fire, authorized replacement again to the level existing at the time of enactment of the ordinance and in some cases replacement of that particular non-conforming use with another non-conforming use

Thus, it is not only questionable whether the respondent ever raised or preserved his federal constitutional claims in the Indiana state courts, but it is even less clear whether the Indiana courts considered these potential claims in rendering their judgments. Rather, a fair reading of the opinions below of the Court of Appeals and Supreme Court of Indiana reveals that the judgments rested upon an independent state ground—Article One, Section 21 of the Constitution of the State of Indiana—thus depriving this Court of jurisdiction over this petition for a writ of certiorari. 28 U.S.C. §1257; *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (where record is ambiguous as to whether state court judgment rested on state or federal ground, the Supreme Court either refrains from reviewing the decision or returns case to the state court for clarification).

Equally so, had Rouse's challenge to the constitutionality of the Ripley County zoning ordinance failed before the Indiana Supreme Court, it is unlikely that he could invoke this Court's appellate jurisdiction to seek review of that decision. *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Correspondingly, Ripley County should be precluded from invoking the Court's *certiorari* jurisdiction by posthumously suggesting that Rouse's claim was cultivated in the turf of the Fourteenth Amendment and by speculating that the Indiana Supreme Court, without revelation, explanation or citation, struck down a local zoning ordinance on *federal* rather than state constitutional grounds. Jurisdiction under 28 U.S.C. §1257(3) has never rested on so slender a thread. Accordingly this petition for a writ of certiorari should be denied.

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that fell in the same class of uses as the original non-conforming use. By this method there was a gradual phasing out of non-conforming uses without taking from the user the right to exercise a use that was lawful prior to the enactment of the ordinance so long as all of the conditions and limitations were met. *Metropolitan Development Commission, supra; Jacobs, supra; Misner, supra.* App. at 5-6.

B.

Assuming, *arguendo*, that the opinion of the Supreme Court of Indiana was grounded in the due process clause of the Fourteenth Amendment, this Court should deny the petition for a writ of certiorari because the amortization provision in the Ripley County ordinance constitutes a deprivation of property without due process and just compensation. While it is settled that municipalities are generally empowered to enact zoning ordinances which regulate the use of property, it is also clear that such zoning typically relates to future development and works no disturbance with existing uses of property. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Lutz v. New Albany City Plan Commission*, 230 Ind. 74, 101 N.E.2d 187 (1951). Typically, pre-existing nonconforming uses of property[5] were excepted from the operation of zoning ordinances, and the owner was entitled to maintain his use of the property so long as that use was not expanded or destroyed, was uninterrupted, and was not abandoned. *Jacob s v. Michawaka Board of Zoning Appeals*, Ind.App., 395 N.E.2d 834 (1979). Indeed, it was generally recognized that to require an immediate cessation of a pre-existing nonconforming use of property would constitute a deprivation of property without due process. *See*, e.g. *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958); *Grant v. City of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957); *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930); *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949); *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953); *Jacobs v. Mishawaka Board of Zoning Appeals*, *supra*. These

[5]The phrase "non-conforming use" has been defined to be a "use of premises which lawfully existed prior to the enactment of a zoning ordinance and which is allowed to be maintained or continued after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area." *Jacobs v. Mishawaka Board of Zoning Appeals*, Ind.App., 395 N.E.2d 834 (1979); *Metropolitan Development v. Marianos*, Ind., 408 N.E.2d 1267 (1980).

decisions recognize the legitimate authority of the government to regulate prospectively the use of land and the propriety of the general policy of gradually eliminating nonconforming uses of property. However, they also accorded full credit to the maxim that "property" includes "not only ownership and possession but also the right of use and enjoyment for lawful purposes." *Hoffman v. Kinealy*, Mo., 389 S.W.2d 745 (1965). *Accord; Department of Financial Institutions v. General Finance Corp.*, 227 Ind. 373, 86 N.E.2d 444 (1949), (to deprive an owner of his use of the property is synonymous with depriving him of his physical interest in that property); *City of Akron v. Chapman, supra; Spann v. Dallas*, 111 Tex. 350, 235 S.W. 513 (1921); *O'Connor v. City of Moscow, supra.* Recognizing that due process of law prohibited the exercise of zoning authority to require an immediate cessation of a pre-existing, nonconforming use, local governments sought to achieve rapid uniformity in the use of land by phasing out nonconforming uses over various periods of time under the technique of "amortization." By amortization, owners are permitted to "amortize" the loss of their present beneficial use of property over a specified period of time, and thus, presumably, avoid the loss of the value of the use of their property. *See*, e.g. *Village of Oak Park v. Gordon*, 32 Ill.2d 295, 205 N.E.2d 464 (1965); *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 274 P.2d 34 (1954); *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 S. 314 (1929); *Grant v. City of Baltimore, supra; Lachapelle v. Town of Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967).

In determining the reasonableness and thus constitutionality of these amortization ordinances, courts typically attempted to weigh the hardship inflicted upon the property owner by requiring him to discontinue his non-conforming use against the public benefit to be gained by terminating that use. *See*, e.g. *Village of Oak Park v. Gordon, supra; Rives v. City of Clarksville*, Tenn.App., 618 S.W.2d 502 (1981); *Temple Baptist Church v. City of*

Albuquerque, 98 N.M. 138, 640 P.2d 565 (1982); *Harbison v. City of Buffalo, supra; City of Seattle v. Martin*, 54 Wash.2d 541, 342 P.2d 602 (1959), *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 274 P.2d 34 (1954). Where the courts have determined that such amortization ordinances are not violative of due process, they have typically concluded that the balance tipped in favor of the public interest in eradicating the nonconforming uses. Not surprisingly, many of these cases have scrutinized the use of property for storage and sale of used automobile parts (*See*, e.g., *Harbison v. City of Buffalo, supra; Lachapelle v. Town of Goffstown, supra; White v. City of Dallas*, Tex.Civ.App., 517 S.W.2d 344 (1974); *McKinney v. Riley*, 105 N.H. 249, 197 A.2d 218 (1964)) and billboards, since these businesses do not fare well in the aesthetic eyes of the public. However, as has been noted, "the principle of the decision applies equally to stores, shops or service organizations which are retroactively legislated out of existence by abolition of non-conforming uses. If petitioner's establishment is not secure against this kind of invasion, no one else's business is better protected. *** If this part of the city is to be redeveloped, it should be done through the enactment of a statute similar to slum clearance acts, whereby just compensation can be paid for private property that is confiscated for a public use." *Harbison v. City of Buffalo, supra*, 152 N.E.2d at 51 (dissenting opinion).[6]

The decisions upholding amortization ordinances, however, have not been universally acclaimed, and many were decided by deeply divided courts. *See*, e.g. *Harbison v. City of Buffalo, supra*, (4-3); *Board of Supervisors of Cerro Gordo County v. Miller*, Iowa, 170 N.W.2d 358 (1969) (4-4); *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950) (2-1). The dissenters in these cases aptly pointed

[6]In the instant case, these principles would be impossible to implement even if accepted. The record is devoid of evidence demonstrating either the public interest to be secured by amortizing Rouse's non-conforming use of the property, the private loss which Rouse would sustain thereby, or the considerations which prompted the enactment of the ordinance.

out that the standard developed to determine the "reasonableness" of amortization ordinances are unprincipled and are virtually incapable of application. As the Iowa Supreme Court dissent stated: "An individual's right to due process cannot rest upon such a nebulous balancing of the scales by courts of various convictions and inclinations. If this test were all that is needed to satisfy due process, we could avoid the use of eminent domain in many situations. With proper planning property owners could be told that in five years their property will be taken for a public purpose without compensation." *Board of Supervisors of Cerro Gordo County v. Miller, supra*, 170 N.W.2d at 367.

The absence of measurable standards predictably has led to enormously variant periods of amortization for like businesses and confusing and contradictory court decisions. For example, some localities have determined that a junkyard owner should close his business within one (1) year (*McKinney v. Riley, supra*), whereas others have considered three (3) years to be reasonable (Decatur County, Indiana) and still others, five (5) years (Ripley County, Indiana). Outdoor signs have been required to be removed within 3 years (Cumberland County, North Carolina and Brighton, New York)[7] and others have been ordered removed in three (3) to six (6) years.[8] Similarly, courts have struggled without success with the chore of reading the scales which balance the public interest in health, safety, morals and welfare against the financial losses to the individual. Compare, for example, *Village of Oak Park v. Gordon, supra*, with *Gurnee v. Miller*, 69 Ill.App.2d 248, 215 N.E.2d 829 (1966); *Corpus Christi v. Allen*, 152 Tex. 137, 254 S.W.2d 759 (1953) with *White v.*

[7]See, *County of Cumberland v. Eastern Federal Corp.*, 48 N.C.App. 518, 269 S.E.2d 672 (1980); *Rochester Poster Advertising v. Town of Brighton*, 49 A.D.2d 273, 374 N.Y.S.2d 510 (1975).

[8]See, *Suffolk Outdoor Advertising v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263 (1977).

City of Dallas, Tex.Civ.App., 517 S.W.2d 344 (1974). As the dissent in *Harbision v. City of Buffalo* bemoaned, this inconsistent and unequal treatment of property owners:

> ...is enough to display the confusion into which this subject is becoming involved in some jurisdictions in consequence of departing from the established rule. The courts find themselves obliged, without any guiding principle, to pick and choose between instances where a prior nonconforming use will or will not be protected in the courts. * * * The grace period allowed bears no discoverable relation to the kinds of property or businesses involved.
>
> * * *
>
> In practice this spells confusion, instability, inability to diagnose what are legal rights, inconsistency, arbitrariness and discrimination in administrative and court decisions, and an avalanche of litigation.

152 N.E.2d at 52-53.

Rather than choose this treacherous and compromising course, the Indiana Supreme Court planted its feet on the solid principle that pre-existing nonconforming uses are entitled to constitutional protection so long as they do not constitute a nuisance. And in so ruling, the Court aligned itself with the many jurisdictions which have recognized that amortization is the noose around the neck of due process.[9] Because the judgment in this case is consistent

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[9]Missouri: *Hoffman v. Kinealy*, *supra* (decided under state constitution)
Kentucky: *City of Paducah v. Johnson*, Ky., 522 S.W.2d 447 (1975)
South Carolina: *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955)
Ohio: *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953)
New Jersey: *United Advertising Corp. v. Rautan*, 11 N.J. 144, 93 A.2d 362 (1952) (decided under state statute).
Arkansas: *City of Fayetteville v. S & H, Inc.* 261 Ark. 148, 547 S.W.2d 94 (1977)
Idaho: *O'Connor v. City of Moscow*, *supra*.
Michigan: *DeMull v. Lowell*, 368 Mich. 242, 118 N.W.2d 232 (1962) (decided under state statute).

with principles of due process of law, this petition for a writ of certiorari should be denied.

C.

The denial of this petition will not leave Indiana communities helpless in achieving the important goal of reducing nonconforming uses of real property. Several avenues remain open. Communities could do nothing and await the gradual removal of nonconforming uses. Where a business or other use of property constitutes a nuisance, an action may be initiated to terminate that use. Communities could place limitations on the extension of nonconforming uses and repairs to property, and could provide tax and other incentives to relocate. If these measures did not resolve the problems quickly enough to promote the public good, counties and municipalities may utilize their power of eminent domain to purchase the property at a fair price, thereby providing just compensation to the affected owner and achieving the public interest in discontinuing the undesired use. Ind.Code §36-1-4-5. Thereafter the property could be resold to a buyer who will conform his use to the applicable zoning. However we should never lose sight of the caveat of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922), that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Office - Supreme Court, U.S.
FILED
FEB 29 1984
ALEXANDER L. STEVAS
CLERK

No. 83-942

IN THE

Supreme Court of the United States

October Term, 1983

RIPLEY COUNTY AREA PLAN COMMISSION,

Petitioner

vs.

MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents.

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONER'S REPLY BRIEF

In a desperate attempt to evade review of the substantial constitutional issue posed by the petition for certiorari, Respondent Melvin T. Rouse (hereinafter "Rouse") has suggested that the holding *sub judice* was bottomed on Article I, §21 of the Indiana Constitution. Thus it is urged that inasmuch as the judgment below was based on an independent and adequate state ground, this Court lacks jurisdiction to entertain the case.

This position is clearly untenable and cannot be squared with the "plain statement" rule recently enunciated by the

Court in *Michigan v. Long*, ___ U.S. ___, 103 S.Ct. 3469, ___ L.Ed.2d ___ (1983). Applying the analysis set forth therein to the facts at bar, it seems readily apparent that the opinion of the Indiana Supreme Court, which struck down amortization as *per se* "the taking of property without due process of law" (App. A-8), rests squarely on the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *Long*, this Court expressed dissatisfaction with its prior *ad hoc* method of dealing with cases that involved possible adequate and independent state grounds.

> "Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue. In some instances, we have taken the strict view that if the ground of decision was at all unclear, we would dismiss the case. See, e.g., *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934). In other instances, we have vacated, see, e.g., *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 20 (1940), or continued a case, see e.g., *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945), in order to obtain clarification about the nature of a state court decision. See also *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972). In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached. See *Texas v. Brown*, ___ U.S. ___, ___, 103 S.Ct. 1535, 1538, 75 L.Ed.2d 502 (1983) (plurality opinion)."

103 S.Ct. at 347.

Eschewing the lack of doctrinal consistency in this approach the Court forged the following test for determining whether an asserted non-federal ground

independently and adequately supports a state court judgment.

> "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

103 S.Ct. at 3476.

Judging from the four corners of the Indiana Supreme Court's opinion in this case, it fairly appears that said decision was in fact predicated upon the federal due process clause. Indeed, the precise holding of the case mirrors the language of that provision.

> "We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without *due process of law*, and an unreasonable exercise of the police power." (App. A-8). (emphasis added).

Significantly, the wording of its state counterpart is substantially dissimilar. Article I, §12 of the Indiana Constitution reads in pertinent part: "[E]very man, for injury done to him in his person, property, or reputation shall have remedy by due *course* of law." (emphasis added). If the Indiana Supreme Court had intended to underpin its holding on state due process grounds it could easily have done so by insertion of the word "course" in place of "process" or by a specific citation to that section of the state constitution. Instead it employed terminology commonly associated with the federal constitution. Surely it was not an oversight on the part of the Indiana Supreme Court, the

ultimate expositors of state law, to cast its opinion in terms of "due process of law" rather than "due course of law".

Cognizant of the disparity in language between these two constitutional provisions, Rouse has instead anchored himself to Article I, §21 of the state constitution in an effort to buoy his assertion that the judgment below hinged on an independent and adequate state ground. That provision reads as follows:

> "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

It takes a very tortured reading of the instant opinion to suggest that the Indiana Supreme Court had this provision in mind when ruling that amortization was "a taking of property without due process of law". Rouse's proposition, tenuous at best, is considerably undermined by the fact that nowhere in the opinions of the Supreme Court or Court of Appeals was any mention made of this particular constitutional provision. See generally, *Texas v. Brown*, ___ U.S. ___, 103 S.Ct. 1535, ___ L.Ed.2d ___ (1983); *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).

Apart from this seemingly fatal omission, it should also be noted that none of the state court cases cited by the Indiana Supreme Court as illustrating permissible zoning restrictions on non-conforming uses turned on whether such restrictions contravened Article I, §21. Moreover, both the Indiana Supreme Court and the Indiana Court of Appeals referred to an ALR annotation, see 22 A.L.R.3rd 1134 (1968), as setting out the majority and minority views regarding the constitutionality of amortization. Suffice it to say that none of the cases cited therein implicated Article I, §21.

Notwithstanding these glaring weaknesses in his

position, Rouse blithely surmises that "a fair reading of the opinions below of the Court of Appeals and Supreme Court of Indiana reveals that the judgments rested on an independent state ground———Article One, Section 21 of the Constitution of the State of Indiana...." (Brief in Opp., p. 8). Petitioner respectfully submits that it would be tantamount to repudiation of the recently announced "plain statement" rule for this Court to arrive at such a conclusion. Insofar as the instant state court decision does not indicate clearly and expressly that the Indiana Supreme Court relied upon Article I, §21 in crafting its opinion and where as here it fairly appears that the court moored its decision primarily on the federal due process clause, this Court should indulge the presumption that no independent and adequate basis was present.

While a state court is entirely free to read its own constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis adopted by this Court in favor of a different analysis of its corresponding constitutional guarantee, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), "it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. National Tea Co.*, 309 U.S. 551 at 557, 60 S.Ct. 676 at 679, 84 L.Ed. 920 at 924 (1940). On the basis of inferences as weak as those offered by Rouse this Court should not decline to review the federal question asserted to be present. That the Indiana Supreme Court might have, but did not, invoke the state constitution does not foreclose jurisdiction here. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938).

In short, the jurisdictional prerequisite for review of the Indiana Supreme Court's decision in this case has been met. Moreover, the importance and substantiality of the question presented in the petition for certiorari have not

been denied by Rouse nor has he even addressed the fact that this decision is at odds with numerous cases across the country that have upheld amortization under the federal due process clause. For all of the foregoing reasons, Petitioner reiterates its plea that a writ of certiorari be issued to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted,

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